



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 213, 229, 232, and 252

[Docket DARS-2022-0014]

RIN 0750-AL51

**Defense Federal Acquisition Regulation Supplement: Reporting
Tax Information on Certain Foreign Procurements (DFARS Case
2021-D029)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense
Federal Acquisition Regulation Supplement (DFARS) to allow for
the efficient and accurate identification of contracts subject
to excise tax withholding. DoD is also amending the DFARS to
prohibit use of the Governmentwide commercial purchase card as a
method of payment when the tax on certain foreign procurements
applies. These changes will promote the efficient
administration of the excise tax.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL
REGISTER*].

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone
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SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 87 FR 37473 on June 23, 2022, to amend the DFARS to promote the efficient administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons. Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111- 347), codified at 26 U.S.C. 5000C, imposes a two-percent excise tax on specified Federal procurement payments to certain foreign persons; it does not apply to payments to United States persons. With certain exceptions, to administer this tax DoD must withhold an amount equal to two percent of the amount of specified Federal procurement payments.

One respondent submitted a public comment in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule. A discussion of the comment is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes made from the proposed rule.

B. Analysis of Public Comments

Comment: A respondent expressed support for the rule.

Response: DoD acknowledges the support.

C. Other Changes

The contract clause at DFARS 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, is added

to the list at DFARS 212.301(f) of clauses that are applicable to commercial items.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates a new DFARS clause 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, to implement section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C. The clause at DFARS 252.229-7014 is prescribed at DFARS 229.402-70(k) for use in contracts that include the clause at Federal Acquisition Regulation (FAR) 52.229-12, Tax on Certain Foreign Procurements, for which the contractor represented in its offer that it is a foreign person and is fully exempt from the tax for reasons cited on their Internal Revenue Service (IRS) Form W-14. FAR 52.229-12 is used when FAR 52.229-11, Tax on Certain Foreign Procurements - Notice and Representation, is used; and FAR 52.229-11 does not apply to acquisitions that do not exceed the SAT. Accordingly, DoD is not applying the rule to acquisitions at or below the SAT but is applying the rule to the acquisition of commercial services and commercial products, including COTS items.

A. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products Including COTS Items

10 U.S.C. 2375 (redesignated as 10 U.S.C. 3452) exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533c (redesignated as 10 U.S.C. 4862), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b (redesignated as 10 U.S.C. 4863); or
- Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the acquisition of commercial items (including COTS items) and commercial services; or
- USD (A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision or contract clause requirement.

Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C and implemented by this rule, does not impose criminal or civil penalties; does not require purchase pursuant to 10 U.S.C. 2533b or 2533c; and does not refer to 10 U.S.C. 2375. Section 301 will not apply to the acquisition of commercial products including COTS items or to the acquisition of commercial services unless a written determination is made. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make the written determination. DoD has made that determination to apply this rule to the acquisition of commercial products including COTS items and to the acquisition of commercial services, if otherwise applicable.

B. Determination

The clause at 252.229-7014 is intended to provide a simple and efficient way for contracting officers to alert the DoD payment systems and networks that a contractor claimed a full exemption from the two-percent excise tax in its offer, thereby preventing erroneous withholding of the tax. Not applying the clause to contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule. Consequently, DoD is applying the rule to contracts for the acquisition of commercial services and commercial products, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This rule is intended to promote efficient administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons. The rule prescribes inclusion of a new DFARS clause in contracts when the tax on certain foreign procurements applies and the contractor claimed a full exemption from the tax. In addition, the rule prohibits use of the Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies and the contractor did not claim a full exemption.

DoD received no comments in response to the initial regulatory flexibility analysis.

The rule applies to Federal Government contracts that include FAR 52.229-12, that are valued over \$250,000, and that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country"). Data for fiscal year 2021 was obtained from the Federal Procurement Data System for contract awards reflecting these criteria. There were 123 total awards; 117 were awarded to 56 unique large foreign entities and 6 were awarded to 4

unique small foreign entities for a total of 50 unique foreign entities. Accordingly, the final rule is not expected to have a significant impact on small entities based in the United States.

This rule imposes no reporting, recordkeeping, and other compliance requirements.

There are no known available alternatives to accomplish the desired objective of the statute.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 1545-2263, titled Tax on Certain Foreign Procurement.

List of Subjects in 48 CFR Parts 212, 213, 229, 232, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 213, 229, 232, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 213, 229, 232, and 252 continues to read as follows:

Authority: 41 US.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by—

a. Redesignating paragraphs (f)(xiii) through (f)(xix) as paragraphs (f)(xiv) through (f)(xx); and

b. Adding new paragraph (f) (xiii).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiii) *Part 229—Taxes.* Use the clause at 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, as prescribed at 229.402-70, to comply with 26 U.S.C. 5000C.

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PART 213—SIMPLIFIED ACQUISITION PROCEDURES

3. Amend section 213.301 by redesignating paragraph (4) as paragraph (5) and adding a new paragraph (4).

The addition reads as follows:

213.301 Governmentwide commercial purchase card.

* * * * *

(4) The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

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PART 229—TAXES

4. Add subpart 229.2, consisting of section 229.204, to read as follows:

SUBPART 229.2—FEDERAL EXCISE TAXES

229.204 Federal excise tax on specific foreign contract payments.

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

5. Amend section 229.402-70 by adding paragraph (k) to read as follows:

229.402-70 Additional provisions and clauses.

* * * * *

(k) Use the clause at 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, in contracts that include the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, when the contractor has—

(1) Represented that it is a foreign person in response to the provision at FAR 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation; and

(2) Indicated that it is fully exempt from the tax for reasons cited on their IRS Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments.

PART 232—CONTRACT FINANCING

6. Add sections 232.1108 and 232.1108-70 to subpart 232.11 to read as follows:

232.1108 Payment by Governmentwide commercial purchase card.

232.1108-70 Prohibition of Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies.

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-7014, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Add section 252.229-7014 to read as follows:

252.229-7014 Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements.

As prescribed in 229.402-70(k), use the following clause:
FULL EXEMPTION FROM TWO-PERCENT EXCISE TAX ON CERTAIN FOREIGN PROCUREMENTS (OCT 2022)

(a) As the Contractor represented in its offer, any item, including any item delivered under subcontract; any service; or any combination thereof delivered under this contract is fully exempt from the 2-percent excise tax withholding imposed by 26 U.S.C. 5000C and implemented by Federal Acquisition Regulation (FAR) 52.229-12, Tax on Certain Foreign Procurements.

(b) If the full exemption no longer applies due to a change in circumstances during the performance of the contract, causing the Contractor to become subject to the withholding for the 2-percent excise tax as imposed by 26 U.S.C. 5000C, then the Contractor shall immediately comply with the notification and billing requirements of FAR clause 52.229-12.

(End of clause)